Railway Assets Corp v Elmspark Holding Sdn Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–113 OF 1996
GOPAL SRI RAM, ABU MANSOR AND DENIS ONG JJCA
5 JUNE 1997

Landlord and Tenant *— Creation — Title — Absence of — Tenancy erroneously granted by non-owner — Whether the owner's acceptance of the tenants' proposal to pay compensation and periodical rental made valid an otherwise invalid tenancy*

Landlord and Tenant *— Creation — Grant of fresh lease — Whether consent order was a mere consequence of the tenancy agreement — Whether the order was a fresh lease — Whether the order created new rights and impose new obligations apart from those set out in the tenancy agreement*

Landlord and Tenant *— Determination — Tenant becomes a trespasser — Whether notices to quit were valid — Whether upon expiry of notice period, tenant became a trespasser*

Landlord and Tenant *— Determination — Notice — Construction — Lease for eight years — Whether lease became a monthly tenancy upon expiry of notice — Intention of parties — Whether subsequent notice to quit was valid and sufficient to determine monthly tenancy — Whether monthly tenancy was validly determined — Whether tenant became a trespasser*

The appellant was established under the Railways Act 1991 and was the owner of all railway land located within Semenanjung Malaysia. The appellant also owned a four-storey office building located in Brickfields ('the subject property'). Keretapi Tanah Melayu Bhd ('KTMB') under the erroneous assumption that it owned the subject property had by a letter dated 13 March 1993 leased it to the first respondent for eight years and seven months ('the original lease'). The appellant subsequently became aware of the lease and instituted Civil Suit No S5–22–77–1994 on 17 February 1994 to recover possession of the subject property ('the first suit') from the first and second respondents together with a few other defendants in the suit.

By a letter dated 7 November 1994 ('the letter of offer'), the first respondent made a proposal to KTMB and/or the appellant for an out of court settlement of the first suit which, inter alia, included an offer to pay compensation for the letting of the subject property and for a monthly rental to be paid commencing from 1 January 1995. The letter of offer also provided for the terms of the letter of offer to be recorded as consent order in the first suit. The proposal in the letter of offer was accepted by KTMB and the appellant and a consent order was recorded.

However, on 21 December 1994, KTMB wrote to the first respondent giving six months notice ('the first notice') to recover possession of the subject property pursuant to cl 15 of KTMB's letter

dated 13 March 1993. On 31 July 1995, the appellant gave the first respondent one month's notice ('the second notice') commencing from 1 August 1995 to quit and deliver up possession of the subject property on or before 1 September 1995. When the first respondent did not comply with the second notice, the appellant commenced action ('the second suit') to recover possession on the ground that the first respondent and the other defendants, all of whom are sub-tenants, were trespassers. The first respondent counterclaim against KTMB, who was not a party to the second suit and added KTMB as third party to the second suit. The trial judge held that the first respondent and the other defendants were not trespassers because the first notice and the second notice were invalid. The trial judge proceeded to dismiss the appellant's claim but did not deal with the first respondent's counterclaim. Against this decision, the appellant appealed.

The sole issue in the appeal was whether the respondents were trespassers in respect of the subject property and this would depend upon the validity of the notices to quit. The respondents contended that the notices were invalid because the appellant, through the consent order, had granted a fresh lease for the remaining period with effect from 1 January 1995. Counsel for the respondents pointed out that the consent order dated 13 January 1995 made no reference to the first notice dated 21 December 1994. That notice, according to counsel for the respondents, was spent. Counsel further argued that if the appellant wanted to have possession under cl 15, it would have to issue a fresh notice. Counsel also argued that when the second notice of 31 July 1995 was issued, the first respondent was not a monthly tenant. That notice, he submitted, was therefore also ineffective. It was also submitted that the second notice did not have the effect of terminating the monthly tenancy.

The appellant on the other hand, submitted that no new lease had been created between his client and the first respondent with effect from 1 January 1995. His argument was that the first respondent after 21 December 1994 had merely six months of the original lease in its hands. That lease expired on 30 June 1995. Thereafter, the first respondent became a monthly tenant. The second notice dated 31 July 1995 properly determined the monthly tenancy. Consequently, with effect from 1 September 1995, the first respondent and all those holding under it were trespassers.

Held, allowing the appeal and dismissing the first respondent's counterclaim:

(1) KTMB was not the owner and had no right whatsoever over the subject property. A complete stranger who has no interest whatsoever in land has no title/interest to pass to anyone. Therefore, the original lease granted on 13 March 1993 by KTMB to the first respondent was not worth the paper on which it was written. However, by accepting the letter of offer, the

appellant had approbated an invalid lease. What the appellant, the first respondent and KTMB sought to do by the letter of offer was to formalize and make valid an otherwise invalid transaction (see p 236A, E, F–G); *J Selvam & Anor v S Mehta & Anor* [1981] 2 MLJ 45 distinguished. A

(2) The consent order was not a separate instrument standing apart from letter of offer dated 7 November 1994. The consent order was a mere consequence of the agreement already arrived at pursuant to the letter of offer. That order added nothing, created no new rights and did not impose any new obligations apart from those set out in the letter of offer (see p 237A–B). B

(3) The court in ascertaining the intention of the parties is entitled to look at the surrounding circumstances. The court do not merely construe the word of a contract embodied in a single document but are concerned with a set of facts and circumstances which, when taken together, points to the intention of the parties in relation to the effect that was meant to be given by them to a particular transaction. C D

The totality of the circumstances, when viewed as a whole, revealed that the parties intended that the first respondent should have the original lease granted by KTMB only until 30 June 1995. That was the objective aim of the compromise arrived at as well as the subsequent events leading up to the second notice dated 31 July 1995. E

Therefore, KTMB's notice of 21 December 1994 was valid and effectual to terminate the relationship of landlord and tenant in respect of the lease granted to the first respondent. All that remained in the hands of the first respondent on 1 January 1995 was the six months' notice period (see pp 237D, I and 238A, B); *St Edmundsbury & Ipswich Diocesan Board of Finance & Anor v Clark (No 2)* [1975] 1 WLR 468 followed. F

(4) The language of the second notice sufficiently complied with the law on the subject. It is settled and beyond question that a monthly tenancy period of the notice to quit, in the absence of a special agreement, must correspond with the length of the tenancy and must determine at the end of a periodic month from the commencement of the tenancy. The second notice was valid and sufficient to determine the monthly tenancy held by the first respondent after 30 June 1995. G H

The monthly tenancy having been validly determined, the first respondent and all those holding under it were trespassers on or after 1 September 1995 (see p 238G, H); *Ko Teck Kin v Watkinson* [1961] MLJ 73 followed. I

Obiter:

In respect of the first respondent's counterclaim for specific performance in the second suit against KTMB who was not a party

to the second suit, it was unnecessary to add KTMB as a third party to the second suit. That was because the provisions of O 15 r 3(2) of the Rules of the High Court 1980 provides that where a defendant joins a person as a party against whom he makes a counterclaim, he must add that person's name to the title of the action and serve on him a copy of the counterclaim (see p 234F–G).

[Bahasa Malaysia summary

Perayu ditubuhkan di bawah Akta Keretapi 1991 dan adalah pemunya semua tanah keretapi yang terletak di Semenjung Malaysia. Perayu juga memiliki bangunan pejabat empat tingkat yang terletak di Brickfields ('harta subjek'). Keretapi Tanah Melayu Bhd ('KTMB') di bawah anggapan yang silap bahawa ia memiliki harta subjek telah melalui surat bertarikh 13 Mac 1993 memajaknya kepada penentang pertama selama lapan tahun dan tujuh bulan ('pajakan asal'). Perayu kemudiannya mendapat tahu mengenai pajakan itu dan memulakan Guaman Sivil No S5–22–77–1994 pada 17 Februari 1994 untuk mendapatkan kembali milikan harta subjek ('guaman pertama') daripada penentang pertama dan kedua bersama dengan beberapa orang defendan dalam guaman itu.

Melalui surat bertarikh 7 November 1994 ('surat tawaran tersebut'), penentang pertama membuat cadangan kepada KTMB dan/atau perayu untuk penyelesaian guaman pertama di luar mahkamah yang, antara lain, termasuk tawaran untuk membayar pampasan bagi penyewaan harta subjek dan untuk sewa bulanan untuk dibayar bermula pada 1 Januari 1995. Surat tawaran tersebut juga memperuntukkan terma-terma surat tawaran tersebut untuk direkodkan sebagai perintah persetujuan dalam guaman pertama. Cadangan dalam surat tawaran tersebut telah diterima oleh KTMB dan perayu dan perintah persetujuan direkodkan.

Bagaimana pun, pada 21 Disember 1994, KTMB menulis kepada penentang pertama memberikan enam bulan notis ('notis pertama') untuk mendapatkan kembali milikan harta subjek mengikut fasal 15 surat KTMB bertarikh 13 Mac 1993. Pada 31 Julai 1995, perayu memberi kepada penentang pertama satu bulan notis ('notis kedua') bermula daripada 1 Ogos 1995 untuk keluar dan menyerahkan pemilikan harta subjek pada atau sebelum 1 September 1995. Apabila penentang pertama tidak mematuhi notis kedua, perayu memulakan tindakan ('guaman kedua') untuk mendapatkan kembali pemilikan atas alasan bahawa penentang pertama dan defendan-defendan lain, kesemuanya merupakan penyewa kecil, adalah penceroboh. Penentang pertama menuntut balas terhadap KTMB, yang bukan merupakan satu pihak kepada guaman kedua dan menambahkan KTMB sebagai pihak ketiga kepada guaman kedua. Hakim perbicaraan memutuskan bahawa penentang pertama dan defendan-defendan lain bukan penceroboh kerana notis pertama dan notis kedua adalah tidak sah. Hakim perbicaraan meneruskan untuk menolak tuntutan perayu tetapi tidak membuat keputusan berkenaan dengan tuntutan balas

penentang pertama. Perayu membuat rayuan terhadap keputusan ini. A

Isu tunggal dalam rayuan ini adalah sama ada penentang-penentang adalah penceroboh berkaitan dengan harta subjek dan ini akan bergantung kepada kesahan notis untuk keluar. Penentang-penentang menghujahkan bahawa notis-notis itu adalah tidak sah kerana perayu, melalui perintah persetujuan, telah memberikan pajakan baru untuk tempoh masa yang tinggal berkuatkuasa daripada 1 Januari 1995. Peguam kepada penentang-penentang menunjukkan bahawa perintah persetujuan bertarikh 13 Januari 1995 tidak membuat rujukan kepada notis pertama bertarikh 21 Disember 1994. Notis itu, menurut peguam kepada penentang-penentang, telah tamat. Peguam menghujahkan selanjutnya bahawa sekiranya perayu mahu mendapat milikan di bawah fasal 15, ia perlu mengeluarkan notis yang baru. Peguam juga menghujahkan bahawa apabila notis kedua bertarikh 31 Julai 1995 dikeluarkan, penentang pertama bukan penyewa bulanan. Dengan itu, notis itu, beliau berhujah, adalah juga tidak berkesan. Adalah juga dihujahkan bahawa notis kedua tidak mempunyai kesan menamatkan penyewaan bulanan. B C D

Perayu sebaliknya, berhujah bahawa tiada pajakan baru diadakan di antara kliennya dan penentang pertama berkuatkuasa daripada 1 Januari 1995. Hujahnya adalah bahawa penentang pertama selepas 21 Disember 1994 mempunyai hanya enam bulan daripada pajakan asal dalam tangannya. Pajakan itu tamat pada 30 Jun 1995. Selepas itu, penentang pertama menjadi penyewa bulanan. Notis kedua bertarikh 31 Julai 1995 menamatkan penyewaan bulanan itu dengan wajar. Akibatnya, berkuatkuasa daripada 1 September 1995, penentang pertama dan semua mereka yang memegang di bawahnya adalah penceroboh. E F

Diputuskan, membenarkan rayuan dan menolak tuntutan balas penentang pertama:

(1) KTMB bukannya pemunya dan tidak mempunyai walau apa-apa hak ke atas harta subjek. Orang asing yang tidak mempunyai walau apa kepentingan dalam tanah tidak mempunyai hakmilik/kepentingan untuk memindahkannya kepada sesiapa. Oleh itu, pajakan asal yang diberikan pada 13 Mac 1993 oleh KTMB kepada penentang pertama tidak berguna langsung. Bagaimana pun, dengan menerima surat tawaran tersebut, perayu telah membenarkan pajakan yang tidak sah. Apa yang perayu, penentang pertama dan KTMB hendak buat melalui surat tawaran tersebut adalah untuk memformalkan dan menjadikan sah apa yang sebaliknya merupakan transaksi tidak sah (lihat ms 236A, E, F–G); *J Selvam & Anor v S Mehta & Anor* [1981] 2 MLJ 45 dibeza. G H I

(2) Perintah persetujuan itu bukannya instrumen berasingan yang berbeza daripada surat tawaran bertarikh 7 November 1994. Perintah persetujuan itu hanya merupakan akibat daripada perjanjian yang telahpun diikat mengikut surat tawaran tersebut.

A Perintah itu tidak menambahkan apa-apa, tidak mewujudkan hak-hak baru dan tidak mengenakan apa-apa obligasi selain daripada apa yang dinyatakan dalam surat tawaran tersebut (lihat ms 237A–B).

(3) Mahkamah dalam menentukan niat pihak-pihak adalah berhak B untuk mengambil kira keadaan-keadaan sekitaran. Mahkamah tidak hanya mentafsirkan perkataan daripada kontrak yang terkandung dalam satu dokumen tetapi mementingkan satu set fakta dan keadaan-keadaan yang mana, apabila diambil kira bersama, menunjukkan niat pihak-pihak berkaitan dengan kesan yang diniatkan untuk diberikan oleh mereka kepada transaksi C tertentu.

Keadaan-keadaan keseluruhan, apabila dipandang secara menyeluruh, menunjukkan bahawa pihak-pihak berniat bahawa penentang pertama patut mendapat pajakan asal yang diberikan oleh KTMB hanya sehingga 30 Jun 1995. Itu adalah tujuan D objektif kompromi yang dicapai seperti juga peristiwa-peristiwa kemudiannya yang membawa kepada notis kedua bertarikh 31 Julai 1995.

Oleh itu, notis KTMB bertarikh 21 Disember 1994 adalah sah dan berkesan untuk menamatkan hubungan tuan tanah dan E penyewa berkaitan dengan pajakan yang diberikan kepada penentang pertama. Apa yang tinggal dalam tangan penentang pertama pada 1 Januari 1995 adalah tempoh masa enam bulan notis (lihat ms 237D, I dan 238A, B); *St Edmundsbury & Ipswich Diocesan Board of Finance & Anor v Clark (No 2)* [1975] 1 WLR 468 diikut.

F (4) Bahasa notis kedua mematuhi dengan cukup undang-undang atas subjek ini. Adalah mantap dan tanpa persoalan bahawa tempoh masa notis untuk keluar bagi penyewaan bulanan, dengan ketiadaan perjanjian khas, mesti sama dengan tempoh masa penyewaan dan mesti tamat pada akhir bulan berkala daripada G permulaan penyewaan. Notis kedua adalah sah dan mencukupi untuk menamatkan penyewaan bulanan yang dipegang oleh penentang pertama selepas 30 Jun 1995.

Setelah penyewaan bulanan itu ditamatkan dengan sah, penentang pertama dan kesemua mereka yang memegang di H bawahnya adalah penceroboh pada atau selepas 1 September 1995 (lihat ms 238G, H); *Ko Teck Kin v Watkinson* [1961] MLJ 73 diikut.

Obiter:

I Berkenaan dengan tuntutan balas penentang pertama untuk pelaksanaan spesifik dalam guaman kedua terhadap KTMB yang bukan merupakan satu pihak kepada guaman kedua, adalah tidak perlu untuk menambahkan KTMB sebagai pihak ketiga kepada guaman kedua. Ini adalah kerana peruntukan-peruntukan A 15 k 3(2) Kaedah-Kaedah Mahkamah Tinggi 1980 memperuntukkan bahawa

di mana defendan menggabungkan seseorang sebagai satu pihak yang mana tuntutan balas dibuat terhadapnya, beliau mesti menambahkan nama orang itu kepada tajuk tindakan dan menyampaikan ke atasnya sesalinan tuntutan balas itu (lihat ms 234F–G).] A

Notes B

For cases on creation of tenancy, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 780–810.

For cases on notice and notice to quit, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 870–936, 937 and 1169–1175. C

Cases referred to

J Selvam & Anor v S Mehta & Anor [1981] 2 MLJ 45 (distd)
Ko Teck Kin v Watkinson [1961] MLJ 73 (folld)
Prenn v Simmonds [1971] 1 WLR 1381 (refd)
Reardon Smith Line Ltd v Yngvar Hansen-Tangen (t/a HE Hansen-Tangen) [1976] 1 WLR 989 (refd) D
St Edmundsbury & Ipswich Diocesan Board of Finance & Anor v Clark (No 2) [1975] 1 WLR 468 (folld)

Legislation referred to E

National Land Code 1965
Railways Act 1991 ss 89(1), 93
Rules of the High Court 1980 O 15 r 3(2)

Haris bin Mohd Ibrahim (*Adam & Co*) for the appellant.
RR Sethu (*TC Tan* with him) (*Raja Eleena Siew Ang & Tan*) for the first F respondent.
RR Sethu (*TC Tan* with him) (*HY Lee*) for the second respondent.
Azhar Azizan Harun (*Azhar & Goh*) for the sixth and seventh respondents.

Gopal Sri Ram JCA (delivering oral judgment): Until 1991, all railway G land situated within Semenanjung Malaysia was vested in the Federal Lands Commissioner by virtue of a lease in his favour granted to him by the Federal Government. In that year, Parliament passed the Railways Act 1991 ('the Act'). The Act for the purpose of the present appeal made two important changes. First, it created the appellant. This it did by s 89(1) H which reads as follows:

> 89 (1) There shall be established a body corporate by the name of 'Railway Assets Corporation' (hereinafter referred to as 'the Corporation') with perpetual succession and a common seal and may sue and be sued in its name and subject to and for the purposes of this Act, may I enter into contracts, and may acquire, purchase, take, hold and enjoy moveable and immovable property of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any moveable or immovable property or any interest therein vested in the Corporation upon such terms as it deems fit.

Secondly, by s 93, the Act vested all railway land in the appellant. The section is in the following terms:

> 93 All property vested in, held or acquired by the Federal Lands Commissioner under the repealed Ordinance shall vest in the Corporation under this Act without any conveyance, assignment or transfer whatsoever for the like title, estate, or interest and on the like tenure as the same was vested or held immediately before the commencement of this Act and all references to the 'Federal Lands Commissioner' in relation to such property in any instrument, deed, title, document or written law shall be construed as if all such references were references to the 'Railway Assets Corporation'.

The appellant is therefore the owner of all railway land located within Semenanjung Malaysia.

Keretapi Tanah Melayu Bhd ('KTMB') is a public listed company formed under the auspices of the Government of Malaysia. It has only one shareholder. He is the Minister of Finance for the Federation. KTMB was formed in 1992 for the purpose of conducting rail transport within Semenanjung Malaysia.

All these things were done in order to privatize rail transport and in order to give effect to the privatization policy of the elected government.

Among the lands owned by the appellant is a property located in Brickfields. It is a four-storey office building ('the subject property').

On 13 March 1993, KTMB under the erroneous assumption that it owned the subject property leased it to the first respondent for eight years and seven months. There was no formal lease drawn up and executed. It was merely in the form of a letter setting out the terms on which the lease was proposed. There was therefore no registered lease under the National Land Code 1965.

Sometime after that, the appellant became aware of the lease by KTMB of the subject property to the first respondent. It had not agreed to the grant of this lease at all. It wanted to recover possession. In the meantime, however, the first respondent had sublet various parts of the subject property to the other sub-tenants. In order to recover possession, the appellant launched Civil Suit No S5–22–77–1994 on 17 February 1994. The first and second respondents before us were defendants to that action. I will call it 'the first suit'. There were also other defendants to the first suit who are not before us and with whom we are not concerned.

Following the institution of the first suit, the first respondent on 7 November 1994 wrote a letter addressed to 'KTMB and/or Railway Assets Corporation' (the appellant). It is a very important document. For that reason, I would reproduce it here in full. This is what it says:

> Dear Sirs,
>
> Re: (i) Letting of land known as Lots 203(iv) and (v) Section 72, Bandar dan Daerah Kuala Lumpur together with four-storey office building thereon.
>
> (ii) High Court Kuala Lumpur Civil Suit No S5–22–77–1994 *RAC v Eurotwice (M) Sdn Bhd & Ors*

We refer to the above matter and the several discussions between En Mahmud Hashim and En Zainuddin.

As requested, we now write on a strictly without prejudice basis to propose settlement in the following terms:

We will pay to KTM Bhd the sum of RM92,902 as compensation for the letting of the above premises and which sum shall be payable as follows:

(a) the sum of M65,457.66 immediately upon your confirmation of the terms herein; and

(b) the balance sum of RM27,464.34 will be paid to you within seven days from the date of consent order being entered in respect of the above payment only;

(c) we will pay to you a further sum of RM39,677 being rental assessment and quit rent calculated until 31 December 1994 within 30 days from the date of payment of the sum referred to in para 2.1(b) above;

(d) we will pay to Messrs Adam & Co within seven (7) days from the date of the aforesaid consent order the sum of R13,125 being full and final settlement of the legal fees of the above suit; and

(e) you shall cause a consent order to be entered on 22 December 1994 in respect of the above payments by us to you only. Save and except for the sixth and seventh defendants, we and the other defendants will waive any and all claims which we may have against you in respect of the above suit. Further, we will indemnify you for all taxed costs that may be incurred in respect of your withdrawal of the above suit against the sixth, seventh and eigth defendants.

We will, starting from 1 January 1995, pay to you monthly rental of RM7,000 inclusive of car park assessment and quit rent. Apart from the above, we confirm that all other terms and conditions as contained in your letter to us dated 13 March 1993 shall remain the same. We will settle directly with Messrs Skrine & Co the legal fees in respect of the lease agreement.

Kindly confirm your acceptance to the above terms.

(Signed)

It may be noted that para (e) of the foregoing letter requires the consent order to be entered on 22 December 1994. That is because the first suit was coming up for disposal on that date.

The proposal set out in the letter quoted above were accepted by both KTMB and the appellant. It is not known when the acceptance took place. But all counsel before us agreed that it must have taken place around that date, that is to, say 7 November 1994.

The consent order which para (e) speaks of was not entered on 22 December 1994 because the hearing of the suit was adjourned to 13 January 1995. However, between 7 November 1994 and 13 January 1995, another important event took place.

On 21 December 1994, KTMB wrote to the first respondent giving it notice of termination pursuant to the provisions of cl 15 appearing in the letter of 13 March 1993. That clause is in the following terms:

KTM Bhd berhak pada bila-bila masa menamatkan pajakan (sebelum tamat pajakan) dengan pemberian notis selama enam bulan kepada pihak tuan

jika sekiranya tapak tersebut dikehendaki untuk maksud pembangunan oleh KTM Bhd dan wujudnya bangunan yang ada sekarang menghalang pelaksanaan projek tersebut.

This clause enables KTMB to recover possession by giving six months notice in the event:

(1) the subject property is required for the purpose of development by KTMB; and

(2) the subject property stands in the way of the proposed development.

The next event of significance occurred on 13 January 1995. On that date, counsel appeared before Mokhtar Sidin J (as he then was) and recorded a consent order, the material paragraphs of which read as follows:

1 Defendan keempat akan membayar kepada Keretapi Tanah Melayu Bhd ('KTMB') jumlah-jumlah berikut:
(a) RM92,902 ('jumlah pertama') di mana sebahagian jumlah pertama berjumlah RM65,437.66 sudah dibayar dan defendan keempat dikehendaki membayar baki jumlah pertama berjumlah RM27,464.34 dalam masa tujuh hari dari tarikh perintah ini; dan
(b) RM39,677 dalam masa 30 hari dari tarikh tamatnya tempoh yang dipersetujui untuk pembayaran baki jumlah pertama.

2 Defendan keempat akan membayar kepada Tetuan Adam & Co kos tindakan ini yang dipersetujui berjumlah RM13,125 dalam masa tujuh hari dari tarikh perintah ini.

3 Defendan keempat akan membayar segala yuran guaman yang dikenakan oleh Tetuan Skrine & Co berkenaan perjanjian pajakan mengenai Lot 203, Seksyen 72, Bandar dan Daerah Kuala Lumpur termasuk sebuah bangunan empat tingkat ('hartanah tersebut').

4 Mulai 1 Januari 1995, defendan keempat akan membayar kepada KTMB sewa bulanan termasuklah taksiran dan cukai pintu kesemuanya berjumlah RM7,000 sebulan ('sewa tersebut') dan sebagai balasannya plaintiff akan membenarkan defendan keempat menghuni hartanah tersebut tertakluk dan terikat kepada semua terma-terma yang terkandung di dalam surat KTMB kepada defendan keempat bertarikh 13 Mac 1993, kecuali dan melainkan terma yang terkandung di dalam surat tersebut yang menetapkan jumlah sewa bulan.

5 Sekiranya defendan keempat memungkiri atau gagal mematuhi perintah dalam apa cara juga, maka dalam keadaan sedemikian defendan keempat diwajibkan secara serta merta menyerahkan kepada plaintif milikan kosong akan hartanah tersebut dan plaintif adalah bebas untuk membawa prosiding pelaksanaan untuk menguatkuasakan perintah ini.

On 31 July 1995, the appellant wrote to the first respondent giving it notice to quit and deliver up vacant possession of the subject property. I will not paraphrase that letter. Since its validity is in question, I will reproduce it in full. This is what it says:

> We act for Railway Assets Corporation of 2nd Floor, Block B, Wisma Semantan, Jalan Gelenggang, 50490 Kuala Lumpur.
>
> We are instructed that you are currently in occupation of the abovementioned property pursuant to a letting granted unto you by our client.

> We are now instructed to state that the abovementioned property has been earmarked for redevelopment in line with approved plans to redevelop the Brickfields area.
>
> Upon instructions, and in accordance with the terms of the said letting, we hereby give you one month's notice, commencing 1 August 1995 that the said letting is terminated and that you are to deliver up vacant possession of the said property to our client on or before 1 September 1995.
>
> Take notice that in the event you do not deliver up vacant possession of the said property by the aforesaid date, we have our client's instructions to commence legal proceedings for the recovery of the same without further reference to you, in which latter event you will be further liable for the costs occasioned thereby.

The first respondent and those holding under it did not comply with this notice. So, on 13 January 1996, the appellant commenced action ('the second suit') which forms the subject matter of this appeal today. In the second suit, the appellant claimed vacant possession on the ground that the first respondent and the other defendants, all of whom are sub-tenants, were trespassers.

The defendants to the second suit delivered their defences. The first defendant (the first respondent before us) also delivered a counterclaim in which it sought specific enforcement of the lease earlier granted as against the appellant and/or KTMB. I express my surprise at this claim for specific enforcement against KTMB because KTMB was not a party to the second suit. And nothing has been shown to this court to satisfy us that an application to join it as a defendant to the second suit or a defendant to the counterclaim was ever made. However, KTMB was added as a third party to the second suit. That, however, was unnecessary because of the provisions of O 15 r 3(2) Rules of the High Court 1980 which reads as follows:

> Where a defendant joins a person as a party against whom he makes a counterclaim, he must add that person's name to the title of the action and serve on him a copy of the counterclaim; and a person on whom a copy of a counterclaim is served under this paragraph shall, if he is not already a party to the action, become a party to it as from the time of service with the same rights in respect of his defence to the counterclaim and otherwise as if he had been duly sued in the ordinary way by the party making the counterclaim.

The second suit came on for hearing before the High Court on 19 November 1996. It was heard over three days. Counsel put in a written note of their submissions. The learned trial judge, at the conclusion of oral argument, dismissed the appellant's claim. He resolved all issues against the appellant. For purposes of the present appeal, we will confine ourselves to only one of the grounds upon which the learned judge dismissed the action. He held that the first respondent and the other defendants were not trespassers because the notice to quit dated 21 December 1994 was invalid, as was the notice dated 31 July 1995. Unfortunately, however, the learned judge did not deal with or dispose of the first respondent's counterclaim.

Against this decision the appellant appealed to this court. When the appeal came on for hearing before us on 13 May 1997, En Haris Mohd

A Ibrahim of counsel for the appellants informed us that the second suit had been discontinued against the third and eighth defendants in court below. The notice of appeal had nevertheless been directed against them. He therefore orally applied to amend the notice of appeal by deleting the names of these two defendants. There being no opposition to that
B application, we granted it. In the course of arguments, it transpired that the fourth and fifth respondents before us had also vacated the subject property. Encik Haris accordingly sought our leave to discontinue the appeal against these respondents. We allowed the discontinuance, dismissed the appeal against the fourth and fifth respondents and by consent of counsel fixed costs in their favour at RM2,000. For completion, I would
C add we heard this appeal on 13 and 14 May 1997, but the arguments not having been completed, we adjourned it to yesterday and again to today.

The sole issue in this appeal is whether the remaining respondents before us, that is to say the first, second and seventh respondents are trespassers in respect of the subject property. The appellant argues that
D they are. The respondents (which expression hereafter will be used to refer to the remaining respondents before us) argued that they are not trespassers. The learned judge accepted the respondents' contention and held them to be in lawful occupation of the subject property.

It is beyond dispute that whether the respondents are trespassers or
E in lawful occupation is a question that depends for its resolution upon the validity of the two notices to quit I referred to earlier in this judgment. It is that question to which I now address myself.

For the respondents, Mr RR Sethu has argued that the notices to quit in question are invalid because the appellant had granted a fresh lease for the remaining period with effect from 1 January 1995. The lease with
F KTMB was at an end on 31 December 1994. The consent order of 13 January 1995 makes no reference to the notice given by KTMB on 21 December 1994. That notice was therefore spent. If the appellant wanted to have possession under cl 15, it had to issue a fresh notice. When the notice of 31 July 1995 was issued, the first respondent was not a
G monthly tenant. That notice was therefore ineffective. This, in summary is the argument advanced in opposition to the appeal.

Encik Haris has, in support of the appeal, argued that we ought to hearken to the chronology and the circumstances that led to the institution of the second suit. He says that no new lease had been created between his
H client and the first respondent with effect from 1 January 1995. His argument is that the first respondent after 21 December 1994 had merely six months of the original lease in its hands. That lease expired on 30 June 1995. Thereafter, the first respondent became a monthly tenant. The notice dated 31 July 1995 properly determined the monthly tenancy. With effect from 1 September 1995, the first respondent and all those
I holding under him were trespassers. So much for En Haris' submissions.

I am of the opinion that this appeal must be resolved by reference to the totality of the circumstances that were presented to the trial judge in order to ascertain the intentions of the parties. I shall therefore begin with the original purported grant by KTMB on 13 March 1993. KTMB was

not the owner and has no right whatsoever over the subject property. As pointed out by my learned brother Abu Mansor JCA in the course of argument, it had no business to deal with and had no capacity to convey any interest in the subject property to anyone on 13 March 1993. He who does not have cannot give. It follows that if the first suit had been prosecuted to judgment, the appellant's contention that the defendants thereto were all trespassers would have been made out.

But that did not happen. Against the advice of their solicitors given on 10 August 1994, the appellant insisted on compromising the first action in the tripartite agreement contained in the letter of 7 November 1994.

Mr RR Sethu has sought to argue that it would be wrong to describe the grant by KTMB to the first respondent as a nullity. He submits that a non-owner can create a tenancy over immovable property. As authority for that proposition, he has cited to us the decision of Abdul Hamid FJ (later the Chief Justice of Malaysia) in *J Selvam & Anor v S Mehta & Anor* [1981] 2 MLJ 45.

With respect, we are unable to agree with Mr Sethu's argument. The decision in *J Selvam & Anor v S Metha & Anor* is not authority for the proposition that a non-owner can create a valid lease or tenancy over a third party's land. In that case, the tenancy in question had been granted by the chief tenant of premises, and it is trite that a chief tenant has — in the absence of a covenant against subletting or assignment — sufficient interest in the premises he occupies, to pass to another. A complete stranger who has no interest whatsoever in land has no title or interest to pass to anyone. In my view, therefore, the original lease granted on 13 March 1993 by KTMB to the first respondent was not worth the paper on which it was written. If the matter had rested there, no difficulty would have arisen.

However, by accepting the proposal made on 7 November 1994 by the first respondent, the appellant had approbated an invalid lease. It is clear to my mind that what these three entities — the appellant, the first respondent and KTMB — sought to do by the agreement of 7 November 1994 was to formalize and make valid an otherwise invalid transaction so that the apple cart will not be upset. The parties agreed that KTMB would continue to receive rentals but from 1 January 1995 and that the existing relationship shall be transposed from KTMB and the first respondent to the appellant and the first respondent as landlord and tenant.

That brings me to the consent order. The question for me to decide is whether the consent order is a separate instrument standing apart from the agreement of 7 November 1994 or whether it was a mere consequential document. If, as contended by Mr Sethu, the consent order is the source of the relationship of landlord and tenant created afresh from 1 January 1995 between the appellant and the first respondent, it must follow that a fresh notice would have to be given.

That is because the notice earlier given on 21 December 1994 would have been subsumed by the consent order.

With respect, I do not think that the parties intended such a consequence. As pointed out earlier in this judgment, para (e) of the

A 7 November 1994 agreement requires a consent order to be entered in the first suit. Mr Sethu's argument that para 4 of the consent order is different from the agreement arrived at pursuant to the letter of 7 November 1994 is, with respect, without merit. I am entirely in agreement with En Haris' submission that the consent order was a mere consequence of the agreement B already arrived at pursuant to the letter of 7 November 1994. That order added nothing. It created no new rights. Nor did it impose any new obligations apart from those set out in the agreement of 7 November 1994.

The fact that the consent order makes no mention of the notice to quit by KTMB dated 21 December 1994 takes the case no further for the C respondents. It must be borne in mind that if that notice was not within the framework of what the parties had in their minds, one would have reasonably expected the first and the second respondents to have proclaimed their anger at the issuing of that notice followed by their refusal to have anything to do with the entering of the consent order.

D The totality of the circumstances, when viewed as a whole, reveal that the parties intended that the first respondent should have the original lease granted by KTMB only until 30 June 1995. That, in my judgment, is the objective aim of the compromise arrived at as well as the subsequent events leading up to the second notice to quit dated 31 July 1995. The documentary evidence made available in the record provided to us E demonstrates that the first respondent was in the habit of taking a challenge which was fairly open to it. Yet, there was no letter from it to the appellant or KTMB between 21 December 1994 and 13 January 1995 protesting either the validity or the bona fides of KTMB's notice of 12 December 1994.

F Am I entitled to look at the surrounding circumstances for the purpose of ascertaining the intention of the parties in this case? I think that I am. And I find support for my view from the judgment of Sir John Pennycuick in *St Edmundsbury & Ipswich Diocesan Board of Finance & Anor v Clark (No 2)* [1975] 1 WLR 468 at p 477. When delivering the G judgment of the English Court of Appeal in that case, Sir John Pennycuick observed as follows:

> Mr Vinelott contended that the proper method of construction is first to construe the words of the instrument in isolation and then look at the surrounding circumstances in order to see whether they cut down the prima facie meaning of the words. It seems to us that this approach is contrary to H well-established principle. It is no doubt true that in order to construe an instrument one looks first at the instrument and no doubt one may form a preliminary impression upon such inspection. But it is not until one has considered the instrument and the surrounding circumstances in conjunction that one concludes the process of construction.

I The speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, also support the proposition I alluded to a moment ago.

I am conscious that we are here not construing the words of a contract embodied in a single document. We are more concerned with a set of facts and circumstances which, when taken together, points to the

intention of the parties in relation to the effect that was meant to be given by them to a particular transaction. But the general approach and result in either case must, in my judgment, be similar. A

For the reasons I have expressed thus far, I am of the opinion that KTMB's notice of 21 December 1994 was valid and effectual to terminate the relationship of landlord and tenant in respect of the lease granted to the first respondent. All that remained in the hands of the first respondent on 1 January 1995 was the six months' notice period. B

It follows that the learned judge misdirected himself on the evidence before him. I do not think it fair to lay much blame at his door. For the parties before him at the trial had placed a number of issues not entirely relevant to the resolution of the dispute between them. Among these were included the question whether KTMB was or was not the agent of the appellant, which, as I earlier observed was one of the issues resolved by the learned judge against the appellant. C

I am satisfied, had the learned judge addressed himself correctly to the totality of the circumstances and had asked himself what the parties really intended, he would have come to the same conclusion as I have in this appeal. At the end of the day, it is the question of evidence and construction. Where he went wrong was in looking at the matter in a narrow fashion. Had he approached the question of construction in a broad and liberal fashion, he would have realized that the parties intended the first respondent to have only six months notice period in their hands as of 1 January 1995. D E

That brings me to the second notice, the validity of which was attacked by En Azhar of counsel for the sixth and seventh respondents. The burden of his argument is that by the wording of the second notice, it did not have the effect of terminating the monthly tenancy, held by the first respondent after 30 June 1995. With respect, I am unable to agree with En Azhar. The language of the notice dated 31 July 1995 sufficiently complies with the law on the subject. It is settled and beyond question that a monthly tenancy period of the notice to quit, in the absence of a special agreement, must correspond with the length of the tenancy and must determine at the end of a periodic month from the commencement of the tenancy. See *Ko Teck Kin v Watkinson* [1961] 2 MLJ 73. F G

The notice of 31 July 1995 makes it plain that the first respondent had to deliver up vacant possession on or before 1 September 1995. In my judgment, that notice was sufficient to determine the first respondent's monthly tenancy as at 31 August 1995. The monthly tenancy having been validly determined, the first respondent and all those holding under it were trespassers and under an obligation to deliver up vacant possession to the appellant. H

In my judgment, the learned judge ought to have granted the relief claimed by the appellant in its writ in the second suit. Having come to this conclusion, I find it unnecessary to make any remarks touching upon the learned judge's failure to deal with the counterclaim. Since the notices to quit, which I have mentioned so often in this judgment, are valid, no I

question of success upon the counterclaim could possibly arise. For completeness, it should be dismissed with costs.

In the circumstances, the orders I propose to make are as follows. The appeal is allowed with costs here and in the court below, to be taxed and paid by the remaining respondents to the appellant. The first respondent's counterclaim is dismissed with costs. The orders of the learned judge are set aside. There shall be judgment for the appellant as prayed for in prayer (1) of the statement of claim. The deposit lodged in court shall be refunded to the appellant. Vacant possession shall be delivered forthwith.

Abu Mansor JCA: I have found this appeal difficult. But I agree with the judgment of my learned brother Gopal Sri Ram JCA that the appeal should be allowed and the counterclaim be dismissed for the reasons stated in his complete judgment. I too think that the whole case has to be viewed in its entirety and when one does that we counter the intention of the parties and that has been very well stated by my learned brother Gopal Sri Ram JCA. I agree with the orders he proposes to make on the appeal.

Denis Ong JCA: I concur with the judgment of Gopal Sri Ram JCA and I also agree with the orders he proposes to make on the appeal. I have nothing to add.

Appeal allowed, counterclaim dismissed with costs.

Reported by Ooi May Ling